

1
2
3
4
5
6
7 MEHVA ROFFMAN, et al.,
8 Plaintiffs,
9 v.
10 PERFECT BAR, LLC,
11 Defendant.

Case No. 22-cv-02479-JSC

**ORDER RE: MOTION FOR LEAVE TO
FILE MOTION FOR
RECONSIDERATION**

Re: Dkt. No. 36

12
13 Plaintiffs move for leave to file a motion for reconsideration of the Court's September 2,
14 2022 order granting Defendant's motion to dismiss. (Dkt. No. 36; *see* Dkt. No. 34.) After
15 carefully considering the motion, the Court concludes that oral argument is unnecessary, *see* N.D.
16 Cal. Civ. L.R. 7-9(d), and DENIES the motion.

17 Plaintiffs base their motion on Civil Local Rule 7-9(b)(3), “[a] manifest failure by the
18 Court to consider material facts or dispositive legal arguments which were presented to the Court
19 before such interlocutory order.” They specifically challenge the Court’s conclusion that
20 “Plaintiffs’ claims based on the theory that Defendant’s front-label protein claims are misleading
21 without the corresponding PDCAAS figures on the nutrition facts panel are expressly preempted.”
22 (Dkt. No. 34 at 11–12.) Under this theory, Defendant’s claims violate the FDCA’s prohibition on
23 food labeling that is “false or misleading.” 21 U.S.C. 343(a); 21 C.F.R. § 101.13(i)(3).

24 Plaintiffs re-cite three cases from their original opposition in which, they contend, district
25 courts found such a theory not expressly preempted. But they mischaracterize two. *See Swartz v.*
26 *Dave’s Killer Bread, Inc.*, No. 4:21-cv-10053-YGR, 2022 WL 1766463, at *5–6 (N.D. Cal. May
27 20, 2022) (dismissing this theory on reliance grounds, granting leave to amend, and not addressing
28 preemption); *Brown v. Natures Path Foods, Inc.*, No. 21-cv-05132-HSG, 2022 WL 717816, at *6–

United States District Court
Northern District of California

1 7 & n.6 (N.D. Cal. Mar. 10, 2022) (concluding that theory that front-label nitrogen-method protein
2 claim was misleading conflicted with FDCA allowing such a claim without a corresponding
3 PDCAAS figure). And the Court acknowledged the third in its order, (Dkt. No. 34 at 12), but
4 respectfully disagreed. *See Brown v. Van's Int'l Foods, Inc.*, No. 22-cv-00001-WHO, 2022 WL
5 1471454, at *6 (N.D. Cal. May 10, 2022). Plaintiffs' disagreement with the Court's conclusion is
6 not a basis for reconsideration.

7 Because FDA regulations prohibit misleading labeling, *see* 21 C.F.R. § 101.13(i)(3), and
8 permit a nitrogen-method figure to appear on a nutrition facts panel without any other information
9 about protein anywhere on the product, *see id.* § 101.9(c)(7), the nitrogen-method figure is not
10 misleading under the FDA regulations. *See Nacarino v. Kashi Co.*, 584 F. Supp. 3d 806, 809–10
11 (N.D. Cal. 2022). Thus, to find that the nitrogen-method figure is misleading would conflict with
12 FDA regulations which permit a manufacturer to use a nitrogen-method figure. *See Hawkins v.*
13 *Kroger Co.*, 906 F.3d 763, 769–770 (9th Cir. 2018). To hold otherwise would mean that the FDA
14 regulations expressly allow a misleading protein claim, a holding which this Court is not prepared
15 to make. Accordingly, Plaintiffs' motion is DENIED.

16 This Order disposes of Docket No. 36.

17 **IT IS SO ORDERED.**

18 Dated: October 5, 2022

19
20
21
22
23
24
25
26
27
28



JACQUELINE SCOTT CORLEY
United States District Judge